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Opinion of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 481/2/3/4—September Term, 1964.

(Argued June 8, 1965 Decided October 29, 1965.)

Docket Nos. 29524/5/6/7

UNITED STATES OF AMERICA,

Appellee,

—v.—

FRANK COSTELLO, JAMES "TOTTO" MARCHETTI and ARTHUR GJANCI,

Appellants.

UNITED STATES OF AMERICA,

Appellee,

—v.—

FRANK COSTELLO,

Appellant.

UNITED STATES OF AMERICA,

Appellee,

—v.—

JAMES "TOTTO" MARCHETTI,

Appellant.

UNITED STATES OF AMERICA,

Appellee,

—v.—

ARTHUR GJANCI,

Appellant.

Before:

WATERMAN, FRIENDLY and SMITH,

Circuit Judges.

Appeals from judgments of the District Court for Connecticut, William H. Timbers, *Chief Judge,* convicting appellants, after a verdict, of offenses under the federal wagering tax laws. Affirmed.

PHILIP R. SHIFF, New Haven, Conn. (Adrian W. Maher, on brief), *for Appellant Frank Costello.*

JACOB D. ZELDES, Bridgeport, Conn. (Francis J. King, David Goldstein, Joseph S. Catalano, on brief), *for Appellant Marchetti.*

CARROLL W. BREWSTER (Gumbart, Corbin, Tyler & Cooper, New Haven, Conn.) Kimberly B. Cheney, on brief), *for Appellant Gjanci.*

JON O. NEWMAN, United States Attorney (Howard R. Moskof, Assistant United States Attorney, on brief), *for Appellee.*

FRIENDLY, *Circuit Judge*:

These three appeals, along with *United States* v. *Piccioli*, —— F. 2d ——, and *United States* v. *Markis*, —— F. 2d ——, this day decided, stem from a raid carried out by Internal Revenue Service agents and state police in Bridgeport, Connecticut, on October 8, 1964. Appellants Frank Costello, James "Totto" Marchetti and Arthur Gjanci were tried together and convicted on all counts before Chief Judge Timbers and a jury under four indictments. Three two-count indictments similar in form charged each of them with violations of 26 U. S. C. §7203 in that, being engaged in the business of accepting wagers or receiving them for one so engaged, they wilfully failed (1) to purchase the occupational wagering tax stamp required by 26 U. S. C. §4411 and (2) to register as required by §4412. The fourth indictment charged all three with conspiring to fail to purchase the occupational tax stamps. Costello and Marchetti received concurrent one-year prison sentences and $10,000 fines in the conspiracy case and under Count 1 of their individual indictments; the imposition of sentence was suspended and probation for two years was imposed under Count 2. Gjanci's sentences differed in that the fine was $2,500.

Certain points are common to the three appeals and, to some extent, to the two others mentioned. After outlining the facts of this case, we shall deal first with these common points and then consider arguments peculiar to various appellants.

In the summer of 1964 Special Agent John Ripa of the I. R. S. was detailed to work in Bridgeport as an undercover agent, posing as a person wishing to make numbers and horse bets and later as a would-be bookmaker. He placed numerous bets with Gjanci and Marchetti at the

Lafayette Diner or, in some instances with respect to Gjanci, at the Greek Coffee House. On October 2, he placed bets with Costello, paying with two marked $20 bills which were found in Costello's pocket on the latter's arrest. Earlier, on September 3, he had asked Gjanci if he could set up an arrangement to turn in bets and receive a commission. Gjanci said he would speak to Marchetti to arrange this, and also that he would talk to his "bosses—Totto and Frank" about letting Ripa place bets at a local variety store; Gjanci referred to Costello as the "big boss of Bridgeport." On September 9, Marchetti arranged for Ripa to "book on 50%" with "Tony," with settlement to be made with Marchetti. On several later instances Costello made inquiries and gave directions whence the jury could infer that he was indeed "a boss"—if not indeed "the boss," in the enterprise. At trial Costello denied any involvement in the wagering business; Marchetti admitted accepting some bets from Ripa but denied others and also denied Costello's involvement; Gjanci did not testify.

I.

Appellants' most basic point concerns the constitutionality of the federal wagering tax. Recognizing that these provisions were sustained in *United States* v. *Kahriger*, 345 U. S. 22 (1953), appellants say their situation differs in two respects. One is that statements of the prosecutor and the judge demonstrated that the purpose of the Government's applying the statute against them was not to collect revenue, concededly the only available source of federal power, but to promote the enforcement of state laws against gambling; the other is that the enlargement of the self-incrimination clause of the Fifth Amendment to include federal compulsion of the admission of crime

against the states, see *Murphy* v. *Waterfront Comm'n*, 378 U. S. 52, 53 n. 1, 77-78 (1964), overruling *United States* v. *Murdock*, 284 U. S. 141 (1931), and recent emphasis that the clause embraces all statements save those that "cannot possibly" tend to incriminate, see *Malloy* v. *Hogan*, 378 U. S. 1, 12 (1964), place the *Kahriger* holding on self-incrimination in question.[1]

With respect to the first contention, apart from questions as to what effect on constitutionality statements by prosecutors and judges can have, nothing in the present record goes materially beyond what the Supreme Court characterized in *Kahriger* as "suggestions in the debates that Congress sought to hinder, if not prevent, the type of gambling taxed." 345 U. S. at 27 n. 3. If "the verbal cellophane of a revenue measure," 345 U. S. at 38 (dissenting opinion of Mr. Justice Frankfurter), was sufficiently opaque for a majority of the Supreme Court twelve years ago, it remains so for us now. Whether the judge impermissibly allowed considerations unrelated to the nonpayment of the tax to enter into sentence, a claim raised only

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1 Marchetti makes an additional argument based on the 1958 amendment, 72 Stat. 1304, which added to §4401(c) a provision that any person required to register under §4412 who receives wagers for or on behalf of another without having registered the name and residence of the latter as §4412(a)(3) requires, shall himself be liable for the tax on wagers to the extent of his receipts. He contends that since §4412 requires registration by persons required to pay the special tax by §4411 and §4411 requires such payment from anyone who is liable for the percentage tax under §4401 or is engaged in receiving wagers for or on behalf of a person so liable, a cross-reference to §4412 in §4401 necessarily renders the statute circular and unintelligible. We see no force in this argument. The 1958 amendment did not affect who was required to pay the special tax and to register, see 3 U. S. Code Cong. & Ad. News 4457 (1958); it simply made persons who failed to comply with the special requirement of §4412(a)(3) liable for the tax on wagers imposed by §4401, when they would not previously have been.

by Piccioli, is a different problem which we will discuss in the opinion in his case.

The contention with respect to the self-incrimination clause would be more serious if *United States* v. *Kahriger* stood alone, since whatever the stated basis for decision, the result followed so logically from the now-overruled *Murdock* doctrine. However, the Court again considered the Fifth Amendment objection in *Lewis* v. *United States*, 348 U. S. 419 (1955), which arose in the District of Columbia where wagering was a crime by federal law. The Court disposed of the argument on the basis that "If petitioner desires to engage in an unlawful business, he does so only on his own volition. The fact that he may elect to pay the tax and make the prescribed disclosures required by the Act is a matter of his choice. There is nothing compulsory about it, and, consequently, there is nothing violative of the Fifth Amendment." 348 U. S. at 422. If Congress can constitutionally require, as a condition to gambling, a registration that would show an intention to engage in a business prohibited by a federal law, we can think of no reason why it should not have the same power to require registration that would give notice of an intention to engage in activity made illegal by the laws of a state; and the probability of incrimination for future or even past acts, however great, is irrelevant on the Court's stated theory that the registration cannot be called compulsory. It is true that both *Kahriger* and *Lewis* were decided over vigorous dissents by Justices Black and Douglas on the Fifth Amendment point. But we find no subsequent opinion reflecting on the authority or reasoning of these cases and, at least under such circumstances, it is no proper function of ours to speculate on whether the dissent of yesterday may become the decision of tomorrow. Cf. *United States* v. *Zizzo*, 338 F. 2d

577, 580-81 (7 Cir. 1964), cert. denied, —— U. S. —— (1965); *United States* v. *Cefalu*, 338 F. 2d 582 (7 Cir. 1964). We are therefore not required to consider other arguments on which the Government might rely, such as the lack of any claim of the privilege at an earlier stage, see *United States* v. *Sullivan*, 274 U. S. 259, 263-64 (1927); *United States* v. *Kahriger, supra*, 345 U. S. at 32, and the required records doctrine, see *Shapiro* v. *United States*, 335 U. S. 1 (1948); Meltzer, Required Records, the McCarran Act and the Privilege against Self-Incrimination, 18 U. Chi. L. Rev. 687 (1951).

II.

Appellants contend their trial was rendered unfair by publicity, much of it emanating from the Government.

The indictments against appellants and others were returned in New Haven on October 6, 1964; bail was fixed but the indictments remained impounded, F. R. Cr. P. 6(e), until October 8 at 2:36 P.M. A press release distributed earlier by the Government to newsmen announced in part that at 1:20 P.M.: "In a spectacular thrust at the extensive gambling activities in this area, 75 special agents of the Intelligence Division, with the aid of 50 State Policemen, swooped down on some 40 establishments, arresting approximately 45 persons engaged in such gambling activities as policy numbers and betting on horse races and other sports events, in violation of the Federal wagering tax laws. . . . The special agents were successful in breaking up a large, syndicated operation including some of the most important higher-ups in the gambling syndicate." The release mentioned no names except for saying that appellants were charged with conspiracy, as well as with the two substantive counts employed against most other defendants, and

that Costello, Marchetti and a third man had bail fixed at $10,000, $5,000 and $5,000, respectively, while the figure for the other defendants was $2,500. The Government took the newsmen to the I. R. S. headquarters where the latter were able to photograph those who had been arrested as they were brought into custody. There was extensive newspaper, radio and television coverage on October 8 in Bridgeport and elsewhere in Connecticut. On the two following days, the Bridgeport press reported oral statements by Chief Assistant United States Attorney Owens to the effect that the Government had "broken the back of gambling" in Bridgeport, that funds from gambling were supporting prostitution, that housewives had called to express gratitude at the prospective curtailment of their husbands' aleatory propensities, and that Costello and Marchetti had previous convictions for income tax violation.

The last statement was improper by any standard and might well be a basis for reversal if appellants had moved for a change of venue or a continuance and this had been denied, and examination of the jurors had revealed recollection of these charges. *Marshall* v. *United States*, 360 U. S. 310 (1959); *United States ex rel. Brown* v. *Smith*, 306 F. 2d 596, 603 (2 Cir. 1962), cert. denied, 372 U. S. 959 (1963); see *Beck* v. *Washington*, 369 U. S. 541, 555-58 (1962). But appellants did not meet these essential conditions. Being put to plea in New Haven, trial counsel for Costello and Gjanci sought trial in Bridgeport where the publicity had peaked, Marchetti did not object, and no motion for a continuance was made. When the judge examined prospective jurors on November 30, only three of the panel said they had read or heard about the cases, and none of them were chosen. The attack because of the publicity here described came only in a motion in arrest of judgment after

the verdict. This was too late; counsel could not speculate on a favorable verdict and then claim lack of "an impartial jury" when the gamble failed.

Although another episode as to publicity was properly raised, the objection fails on the merits. On December 3, the first day of actual trial, defense counsel, out of the jury's presence, moved for a mistrial because of an article in the Bridgeport Post of December 1 which reported that "six more suspected gamblers arrested by federal agents last October today submitted guilty pleas" and that Owens said he expected others to change their pleas to guilty. At the request of the United States Attorney and with the consent of defense counsel, the court asked the jury, most of whom came from the New Haven area, whether any of them had read anything about the case or related cases since their selection as jurors. None responded, and the motion was denied. Appellants say the jurors' silence did not necessarily reflect the truth since the jurors would not be likely to admit they had violated the judge's previous instructions not to read about the gambling prosecutions. Whatever the force of such a contention might or might not be where publicity subsequent to the selection of the jury could be seriously prejudicial, cf. *United States* v. *Agueci*, 310 F. 2d 817, 831-33 (2 Cir. 1962), cert. denied, 372 U. S. 959 (1963), and cases there discussed, the December 1 article contained nothing that could deprive appellants of a fair trial. If one of appellants had pleaded guilty during the trial, the jury could have been so informed under proper caution. *United States* v. *Crosby*, 294 F. 2d 928, 948 (2 Cir. 1961), cert. denied, 368 U. S. 984 (1962); *United States* v. *Dardi*, 330 F. 2d 316, 332-33 (2 Cir.), cert. denied, 379 U. S. 845 (1964). In the light of that principle it is impossible to see what prejudice could result from a prediction that

other defendants, with no relation to appellants save having been seized in the raids of October 8, might change their not-guilty pleas.

III.

Ripa's testimony was received over a chorus of objections on the score of the hearsay rule. Whenever he testified as to a transaction or communication with one of the appellants, the others would object to its reception against them as hearsay; when he testified as to transactions or communications with other persons at the instance of one or more of the appellants, all three would object on that ground to its admission against any who were not present.

The objections betray a clear although common misconception of the nature of the hearsay rule. Only in a few instances was Ripa's testimony of declarations from which the jury was to accept the truth of the matter asserted, such as Gjanci's statement that Marchetti and Costello were his bosses. The basis for an objection in other cases, e.g., by Gjanci to testimony that Ripa had placed bets with Marchetti or with "Tony," is not at all that this is hearsay; the testimony of Ripa—himself on the stand subject to cross-examination—chiefly described acts, and no out-of-court utterance of Ripa, Marchetti or "Tony" was being offered to prove the truth of anything asserted in such utterance, 6 Wigmore, Evidence §1766 (3d ed. 1940); *Aikins* v. *United States,* 282 F. 2d 53, 57 (10 Cir. 1960); *United States* v. *Annunziato,* 293 F. 2d 373, 376-77 (2 Cir.), cert. denied, 368 U. S. 919 (1961). The proper objection is that, without more, Ripa's story as to a transaction with one person would not be relevant to prove the crime charged against another.

As the Supreme Court made clear in *Lutwak* v. *United States,* 344 U. S. 604, 617-19 (1953), there is a distinction

between acts and declarations with respect to admissibility. Out-of-court declarations of an alleged conspirator introduced to prove the truth of the matter asserted meet the obstacle of the hearsay rule; while always receivable against the declarant as an admission, they can be used against others, unless some other exception applies, only on independent proof of agency, see 4 Wigmore, *supra*, §1079, and the agency does not go beyond statements in furtherance of the conspiracy.[2] Evidence of an act (or a statement offered other than for its truth) has no special evidentiary hurdle to overcome and, whether the act is by a co-conspirator or third person and whether it occurs during the period of a conspiracy or not, the evidence is admissible so long as the act is probative of a crime charged against a defendant and the evidence is not excludable on some special ground.[3] Thus, the acts of others not involving the defendant directly may come in against him merely to show the existence of a conspiracy, with which he is to

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2 Since by hypothesis the conspiracy and defendant's participation must be independently established before the hearsay may be used against him, one may wonder at first blush what role remains for the declaration. Making this point, Judge L. Hand in *United States* v. *Dennis*, 183 F. 2d 201, 230-31 (2 Cir. 1950) (dictum), aff'd, 341 U. S. 494 (1951), suggested that the conspiracy and participation questions be independently decided by the trial judge and the hearsay then given to the jury without limitation. But even if the judge, as in the *Dennis* trial and in the present case, charges that the jury must itself resolve this "preliminary" question beyond a reasonable doubt, the hearsay may still be useful to the prosecution, for example to characterize the conspiracy as to purpose or date, or as evidence that defendant engaged in another crime for which he is on trial. See generally McCormick, Evidence §245, at 522 n. 33 (1954).

3 Paralleling the hearsay exception in evidence law—indeed, its very foundation in Wigmore's view, 4 Wigmore, *supra*, §1079, at 127-31—is the debated contention that a defendant will be liable for the substantive crime of another upon independent proof that the actor was furthering a conspiracy in which defendant was a member. See Developments in the Law—Criminal Conspiracy, 72 Harv. L. Rev. 920, 993-1000 (1959). No such instruction was given in this case.

be linked by quite separate proof. An act of any other conspirator during the alleged conspiracy and in furtherance of it almost inevitably meets this test, and, as held in *Lutwak,* acts by such others even before or after the period of the conspiracy may still be relevant in suggesting its existence and its aims. See *United States* v. *Ross,* 321 F. 2d 61, 68-69 (2 Cir.), cert. denied, 375 U. S. 894 (1963).[4]

Subject to a general point made by Costello which we will mention below, this discussion suffices to dispose of the objections of Marchetti and Costello to the admission of Ripa's testimony as to the placing of bets with Gjanci between July 23 and 31, on the ground that the court had ruled only that a sufficient showing of conspiracy had been made for the period beginning August 12.[5] Even more clearly it disposes of the objection of each appellant to testimony as to conversations and transactions between Ripa and other appellants and non-parties after August 12. Ripa's testimony that Marchetti had called "Tony" and

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4 The briefs exhibit a common confusion in contending that evidence meeting the standard we have indicated would be admissible only under the conspiracy count; such evidence is admissible on substantive counts even when there is no conspiracy indictment at all. *United States* v. *Pugliese,* 153 F. 2d 497, 500 (2 Cir. 1945); *United States* v. *Annunziato, supra,* 293 F. 2d at 378; *United States* v. *Smith,* 343 F. 2d 847 (6 Cir. 1965).

5 We note also that although at the time of the admission of this evidence the court may have been satisfied only as to a conspiracy beginning August 12, other competent evidence later introduced warranted a finding that the conspiracy had existed from July 23 and, indeed, long before. Cf. *United States* v. *Dennis, supra,* 183 F. 2d at 231. The comments in the text and in this footnote apply also to the objection that the court allowed testimony as to acts subsequent to October 2, the last date to which the judge, in his initial ruling, had found the conspiracy extended. And there is nothing to Costello's special objection to the admission of evidence relating to acts on October 7, the day after the indictment had been found; the impounded indictment did not end the conspiracy, as the evidence obtained in the October 8 raids demonstrated.

arranged for Ripa to book with "Tony," with Ripa to settle up with him once a week, was plainly admissible against Marchetti and also against the other appellants so far as it might prove Marchetti engaged in a gambling conspiracy to which they might independently be linked. Gjanci's instructions that Ripa should bet with "Carl" and settle with him were admissible on the same basis. Once evidence of these instructions by Marchetti and Gjanci was admitted against appellants, Ripa's testimony that he had then placed bets with Tony and Carl was highly relevant; evidence that the names or telephone numbers led to a gambling enterprise tended to show that the man furnishing the information—and his independently linked co-conspirators—were part of that enterprise. Ripa, in the course of describing his transactions with the appellants and Tony and Carl, naturally told the jury what he himself said or did during the encounters, but this was not to charge his own behavior or statements to the conspirators but simply to provide the necessary context for understanding their conduct which he was relating. *United States* v. *Morello,* 250 F. 2d 631, 634 (2 Cir. 1957), relied on by appellants, simply held that an out-of-court declaration by an undercover agent acting as a conspirator could not be received against co-conspirators as their admission under the conspiracy exception to the hearsay rule. But as *Morello* itself indicated, the *act* of a co-conspirator was admissible for whatever it was worth against the defendants, although occurring outside their presence and without their knowledge, so long as their participation in the conspiracy was proved by independent evidence; and the undercover agent's description of his own conduct, apart from the use of his out-of-court statements for their truth, received no censure. 250 F. 2d at 634-35.

Costello argues there was no sufficient independent evidence to connect him with the conspiracy, stressing that Ripa did not meet him until September 14. However, Ripa's testimony as to what Costello said and did on that occasion and later amply justified a finding that Costello was one of the "bosses" and had been so from the outset. With the declarations of Gjanci as to Costello's role thus made competent, the contention that the Government failed to adduce sufficient evidence to warrant submission of Costello's case to the jury falls by the wayside.

A final objection relates to oral and written post-arrest statements by Marchetti, discussed in another context below. These were offered and received only against him. In his charge the judge said that the oral statements were received only against Marchetti, but that the written statement was received against all defendants in the conspiracy case although not in the substantive cases other than Marchetti's. No exception to the erroneous instruction was taken. It is plain that if one had been, the judge would have corrected his mistake. For reasons fully explained in *United States* v. *Kahaner,* 317 F. 2d 459, 478-79 (2 Cir.), cert. denied, 375 U. S. 836 (1963), we decline to notice the point.

IV.

As just indicated, Marchetti was interrogated after arrest by a Special Agent, who recorded his oral answers on a question sheet which Marchetti then signed. Apparently Marchetti was first warned of his right not to answer any questions but not of any right to confer with counsel. The agent's testimony and the question sheet were received in evidence against Marchetti without objection. After warning of his right not to answer questions that would incriminate him under federal law, another agent asked Gjanci if

he had a federal tax stamp and, this being answered in the negative, why not; Gjanci replied that he didn't accept wagers but "just play[ed] the numbers." No objection to this testimony was made.

Marchetti and Gjanci now urge that reception of this evidence violated their rights under the Assistance of Counsel clause of the Sixth Amendment as interpreted in *Massiah* v. *United States,* 377 U. S. 201 (1964), and *Escobedo* v. *Illinois,* 378 U. S. 478 (1964), and under F. R. Cr. P. 5(a) as implemented by *McNabb* v. *United States,* 318 U. S. 332 (1943), and *Mallory* v. *United States,* 354 U. S. 449 (1957). The Government contends, *inter alia,* that Gjanci's statement was exculpatory (save as to his stipulated failure to have a tax stamp) and that Marchetti's failure to object was deliberate, since, there being overwhelming proof against him, his sole objective was to protect Costello, as the statement did. We find it unnecessary to examine these contentions. We held some years ago that we need not consider *McNabb-Mallory* objections not clearly made at trial, *United States* v. *Ladson,* 294 F. 2d 535, 538-39 (2 Cir. 1961), cert. denied, 369 U. S. 824 (1962). In the course of its *in banc* consideration of a number of cases involving *Massiah* and *Escobedo* claims arising out of trials after those decisions, the court has reached the same general conclusion, *United States* v. *Indiviglio,* —— F. 2d —— (1965), and we find no special circumstances warranting different action here.

We have carefully examined appellants' other claims of error but do not consider them to require discussion. The Court is indebted to Carroll W. Brewster and Kimberly B. Cheney, assigned counsel, for their presentation on Gjanci's behalf.

Affirmed.

Opinion of Court of Appeals in *U. S.* v. *Piccioli*

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 489—September Term, 1964.

(Argued June 8, 1965 Decided October 29, 1965.)

Docket No. 29521

UNITED STATES OF AMERICA,

Appellee,

—v.—

CARL A. PICCIOLI,

Appellant.

Before:

WATERMAN, FRIENDLY and SMITH,

Circuit Judges.

Appeal from a judgment of the District Court for Connecticut, William H. Timbers, *Chief Judge,* convicting appellant, after a verdict, on a two-count indictment charging violation of 26 U. S. C. §7302 by wilful failure to pay the special gambling occupational tax, 26 U. S. C. §4411, and to register, 26 U. S. C. §4412. Affirmed.

PHILIP BAROFF, Bridgeport, Conn. (Charles Hanken on brief), *for Appellant.*

HOWARD T. OWENS, JR., Assistant United States Attorney (Jon O. Newman, United States Attorney, District of Connecticut), *for Appellee.*

FRIENDLY, *Circuit Judge*:

Piccioli was charged in a two-count indictment with violating 26 U. S. C. §7302 by wilful failure to pay the special gambling tax, 26 U. S. C. §4411, and to register, 26 U. S. C. §4412, and was convicted on both counts before Chief Judge Timbers and a jury. He was sentenced on the first count to imprisonment for one year and a fine of $5,000; on the second, imposition of sentence was suspended and probation fixed at two years.

Piccioli was one of the proprietors of the Pin-Up Bar in Bridgeport. Special Agent Ripa of the I. R. S., testified (on cross-examination) that "Artie" Gjanci, a defendant in *United States* v. *Costello*, —— F. 2d —— (2 Cir. 1965), instructed that, through arrangement between himself and Piccioli, Ripa could place bets with Piccioli and that, when doing this by phone, he should say "This is Bill for Artie." Thereafter Ripa placed numerous horse race bets with Piccioli. There was evidence of furtiveness on Piccioli's part in accepting Ripa's wagers and paying his winnings. During the October 8 raid described in the *Costello* opinion, Special Agent Macolini obtained nearly $500 in cash and checks from Piccioli's pockets, along with three issues of a horse racing publication used by bookmakers. On that occasion in one hour a Connecticut State Trooper engaged in the search of the Pin-Up Bar received 23 calls from persons who were seeking to ascertain odds or, as the jury could properly infer, were about to place bets. Since this and other evidence warranted conviction, we turn to Piccioli's claims of error:

(1) Our *Costello* opinion details the publicity on October 8 and 9. When Piccioli was put to plea in New Haven on October 21, he requested that trial be had in Bridgeport, where the publicity had been most intense. On November

30 and December 1 four juries to try Piccioli's and other gambling cases were selected from the same venire, apparently with the understanding that the cases would be tried *seriatim;* the record shows no objection to that procedure and, when Piccioli's jury was being selected, the only venireman who recalled reading or hearing of his case was not chosen. His trial was adjourned until after that of Costello, Marchetti and Gjanci, which was widely publicized in the Bridgeport press. Piccioli's name figured in this, he being the "Carl" referred to in our opinion in that case; the papers reported he had been subpoenaed by the Government and had been excused at his lawyer's request. When Piccioli's case was called for trial on December 15, his counsel sought a new jury or a continuance because of the publicity given the Costello trial and Piccioli's involvement in it. The judge denied this but said he would inquire of the jurors, which he did without objection from counsel. When asked whether they had read or heard anything about the case or about Piccioli, there was no response.

In this aspect Piccioli's case is not significantly different from that of Costello, Marchetti and Gjanci. No objection on the score of the publicity on October 8 and 9 was made before the adverse verdict. The only issue relating to publicity which was brought to the judge's attention prior to trial was the newspaper accounts of the trial of Costello, Marchetti and Gjanci. A correct report of the trial and conviction of other persons for the same type of offense would not in and of itself be prejudicial, even when, as here, one of them figured in the evidence at the later trial; and there is no reason to suppose the jurors would read into the request that Piccioli be excused a claim of the privilege against self-incrimination. Moreover, we see no reason why the judge had to disbelieve the jurors' responses that the reports had not come to their attention.

(2) Another point has more merit but, in our view, not enough to demand reversal. Special Agent Macolini testified that after completing his search at the Pin-Up Bar, he told Piccioli and the latter's attorney, Mr. Hanken, who had entered the kitchen area in pursuit of a cup of coffee shortly after the raid, that he would like to ask "a few personal history questions"; that the attorney said he had instructed Piccioli not to answer questions; that Macolini then submitted his question sheet to Mr. Hanken; and that the attorney allowed Piccioli "to answer those personal history questions that were on the sheet." No objection was made to this, and the subject was not revived by counsel in cross, redirect, or recross examination. At the conclusion of Macolini's testimony, the judge reverted to this episode and, over objection by defense counsel, elicited an affirmative answer from Macolini to a question, "But the defendant was instructed in your presence by Mr. Hanken not to answer any questions with respect to whether or not he was accepting horse wagers on the premises." After listening to argument, the judge said, "I simply wanted to get it clear in my mind, and I assume the jury did also, as to precisely what happened," and then instructed "that, once the defendant was placed under arrest, it was his privilege under the Constitution not to answer any questions that might tend to incriminate him under Federal law . . . What brought the question on my part was, I was not quite sure what was meant by personal history questions, as distinguished from whatever questions he declined to answer." In submitting the case to the jury, the judge recounted Macolini's testimony and added that Mr. Hanken had a right to advise Piccioli not to answer questions and that Piccioli had a constitutional right not to do so.

Inquiry designed to establish that a defendant claimed the privilege against self-incrimination before a grand jury

or a legislative committee or failed to testify at a former trial has been held in several cases to constitute reversible error. See *Grunewald* v. *United States*, 353 U. S. 391, 415-24 (1957); *Stewart* v. *United States*, 366 U. S. 1 (1961); *United States* v. *Gross*, 276 F. 2d 816 (2 Cir. 1960). If the privilege attaches at the moment of arrest, as the judge assumed, inquiry to show its assertion at that time would seem equally banned.[1] And we would reach the same conclusion although that assumption is wrong and the right of an arrested person not to respond rests simply on the lack of any power in the police to compel testimony—a hotly controverted issue[2] which we need not here decide. Silence under such circumstances, at least when, as in this case, it results from the advice of an attorney, affords no fair ground for relevant inference, see *Kelly* v. *United States*, 236 F. 2d 746, 749 (D. C. Cir. 1956); yet a jury would be likely to give it not inconsiderable weight. As said by Mr. Justice Harlan in *Grunewald, supra*, 353 U. S. at 424, with respect to a claim of privilege before a grand jury, "the dangers of impermissible use of this evidence far outweighed whatever advantage the Government might have derived from it if properly used." Cf. *McCarthy* v. *United States*, 25 F. 2d 298 (6 Cir. 1928); *United States* v. *Pearson*, 344 F. 2d 430 (6 Cir. 1965).

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1 Presumably this is what is meant by the statement in *Fagundes* v. *United States*, 340 F. 2d 673, 677 (1 Cir. 1965), characterizing the right to remain silent on arrest as "akin to the right to decline to take the witness stand in one's own defense." See also *Helton* v. *United States*, 221 F. 2d 338, 340-42 (5 Cir. 1955); but see *Kelly* v. *United States*, 236 F. 2d 746, 750-51 n. 10 (D. C. Cir. 1956).

2 See 8 Wigmore, Evidence §2252, at 328-29 & n. 27 (McNaughton rev. 1960); Morgan, The Privilege Against Self-Incrimination, 34 Minn. L. Rev. 1, 27-30 (1949); Note, The Privilege Against Self-Incrimination: Does It Exist in the Police Station?, 5 Stan. L. Rev. 457 (1953); 1 Morgan, Basic Problems of Evidence 146-48 (1961); Maguire, Evidence of Guilt §2.03, at 15-16 (1959).

The judge's question, for which the cold record affords no apparent reason, was thus ill-advised, to say the least. Nor was it cured, as the Government urges, by his subsequent instruction that the lawyer and Piccioli had been acting within their rights; the proper caution would have been that the evidence was to be disregarded and no inference drawn therefrom. But we cannot see that the question and answer added anything so significant to what Macolini had testified on his direct examination without objection as to afford sufficient basis for reversal, 28 U. S. C. §2111, F. R. Cr. P. 52(a).

(3) The final point requiring discussion is the contention that the judge took impermissible considerations into account in passing sentence.

Piccioli was sentenced on January 11, 1965, along with defendants in other gambling tax cases. In explaining the sentences in the *Costello, Marchetti* and *Gjanci* cases, Chief Judge Timbers made certain remarks which we set forth in part in the margin.[3] He followed these by recommending

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3 "The Court regards these charges as serious. It is faced with the duty of imposing sentence following a finding of guilty by a jury.

"While it is true that these are tax cases, prosecutions authorized by the revenue laws of the United States, it is also a fact, with respect to which the Court is not blind, that it is the clear intent of Congress, in authorizing such prosecutions, to deal with a vice, namely that of gambling.

"While it is perfectly true, and no one knows better than the Court, that the charge against these defendants was not that of gambling, it is equally true that the prosecutions never would have been brought and there never would have been convictions but for extensive gambling and accepting of wagers as demonstrated by the evidence.

"As this Court has observed before, one of the handmaidens of vice in any community—here graphically demonstrated in the Bridgeport community—one of the handmaidens of vice is that of gambling. The other two, with which this Court has dealt severely and will continue to deal severely, are those of narcotics and prostitution. Of course it is

that the United States Attorney forward a transcript of them and of the evidence to Connecticut prosecutors. Later, on February 8, before taking up the criminal calendar in New Haven, Chief Judge Timbers made a further statement about the gambling tax cases with which he had been concerned. In this statement, some nine printed pages long, he praised the work of the United States Attorney and his staff, of the Intelligence Division of the Internal Revenue Service, and of the Connecticut State Police; deprecated the absence of cooperation by the local Bridgeport police and "the apparent lack of willingness or ability on the part of certain of the prosecutors (in one instance under the pretense of 'public apathy,' which is pure, unadulterated bunk) and judges of the state circuit court to back up the local and state police in enforcing the gambling laws of this state"; and noted "the ground swell of public support throughout the state for what has been accomplished by this latest federal crackdown upon gambling and organized crime." After announcing his intention to impose stiff sentences for violation of the federal gambling tax and related laws, he ended by proposing that a Connecticut Conference on Law Enforcement be convened, and outlined a detailed program for its membership and activities.

The circumstances under which an appellate court will interfere with a sentence within the permissible maximum because of the judge's reliance on allegedly irrelevant cri-

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well known that the revenue from gambling is the financial basis or keystone upon which much of crime is built.

"The Court does not intend, in imposing sentence here, to deal out the slap on the wrist which has characterized sentences imposed by the State Courts for violations of the State gambling laws. The Court intends, by the sentences here to be imposed, to serve a stern warning, once again, as the Court has repeatedly in the past, that the United States is not powerless to deal effectively with violations of the Federal revenue laws and particularly the law here involved. It will do so, if need be, alone."

teria, see *United States* v. *Wiley,* 267 F. 2d 453 (7 Cir. 1959), are and, so long as such sentences are generally unreviewable, ought be rare. It would be wholly appropriate for the judge to look beyond Piccioli's failure to register and buy a $50 tax stamp and to consider the attendant substantial losses of revenue through his failure to pay the percentage tax on wagers, of which the judge had heard abundant evidence, even though that crime had not been charged. Cf. *United States* v. *Doyle,* —— F. 2d ——, —— (2 Cir. 1965). Piccioli's argument is thus reduced to the claim that the judge was enforcing not simply the federal laws which were his proper concern but state laws which were not. The record does suggest that the judge's indignation at what he had learned at the trials and from presentence reports may have led to statements in the prosecutorial area beyond his function. On the other hand, since he could have taken into account a record of state crimes and charges unrelated to the federal offense proved, it would be strange if he could not consider that the evidence showed a violation of state gambling laws and the effect of gambling on other state crime. Cf. *United States* v. *Doyle, supra.*

Piccioli's other points either are dealt with in *United States* v. *Costello* or lack sufficient merit for discussion.

Affirmed.

Opinion of Court of Appeals in *U. S.* v. *Grassia*

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 105—September Term, 1965.

(Argued October 28, 1965 Decided November 26, 1965.)

Docket No. 29791

UNITED STATES OF AMERICA,

Appellee,

—v.—

ALFRED GRASSIA,

Appellant.

Before:

LUMBARD, *Chief Judge,*
FRIENDLY and SMITH, *Circuit Judges.*

Defendant, having been charged in a two-count indictment, in the District Court for Connecticut, with willful failure to pay the special occupational tax relating to wagers imposed by 26 U. S. C. §4411, in violation of 26 U. S. C. §7203, changed his plea of not guilty to one of *nolo contendere* on one count, and appeals from the resulting conviction by Judge Clarie. Affirmed.

JACOB D. ZELDES (David Goldstein, Bridgeport, Conn., on brief), *for Appellant.*

JON O. NEWMAN, United States Attorney for the District of Connecticut, *for Appellee.*

FRIENDLY, *Circuit Judge*:

This is another appeal stemming from the raids relating to enforcement of the federal wagering tax at Bridgeport, Connecticut, on October 8, 1964. See *United States* v. *Costello*, —— F. 2d —— (2 Cir. 1965), *United States* v. *Piccioli*, —— F. 2d —— (2 Cir. 1965), and *United States* v. *Markis*, —— F. 2d —— (2 Cir. 1965). Alfred Grassia, represented by counsel and duly questioned by Judge Clarie at a term of the District Court for Connecticut at Hartford, to which, at his request, his case had been transferred for trial on his not guilty plea, pleaded *nolo contendere* to one count of a two-count indictment charging, under 26 U. S. C. §7203, willful failure to pay the special occupational tax relating to wagers imposed by 26 U. S. C. §4411. The other count was then dismissed at the Government's request. His points on appeal from the resulting conviction fall into two categories. The first repeats the same constitutional attacks on the federal wagering tax statutes that were advanced in the earlier cases. His other point is that the conscious generation of publicity by the Government and statements by Chief Judge Timbers in the course of other proceedings in January and February, 1965, prior to Grassia's change of plea,[1] see *United States* v. *Costello*, *supra*, —— F. 2d at ——, slip opinion at 3325-26; *United States* v. *Piccioli*, *supra*, —— F. 2d ——, slip opinion at 3340-41, so prejudiced his opportunity for a fair trial that the indictment should have been dismissed.

The first group of contentions, challenging the constitutionality of the federal wagering tax statutes, survive the plea of *nolo contendere*, as the Government concedes. But, so far as this Court is concerned, they have been deter-

1 The judge's statements were the basis of one of several motions by Grassia to dismiss the indictment or for a continuance.

mined adversely to Grassia by *United States* v. *Costello, supra,* —— F. 2d ——, slip opinion, 3322-25. Recognizing that the rationale of *Albertson* v. *Subversive Activities Control Board,* —— U. S. —— (1965), announced subsequent to our *Costello* opinion, may lead the Supreme Court to overrule its previous decisions in *United States* v. *Kahriger,* 345 U. S. 22 (1953), and *Lewis* v. *United States,* 348 U. S. 419 (1955), insofar as these sustained the federal wagering statutes against attack on the ground of self-incrimination, we consider that issue more appropriate for that Court's determination.

As to Grassia's other contention, that his right to a fair trial was compromised by adverse publicity, the United States concedes that, at the time of the change of plea and the dismissal of the second count, counsel made clear to the prosecutor and the court that Grassia intended to press the point on appeal, contrast *United States* v. *Doyle,* 348 F. 2d 715, 720 (2 Cir. 1965); but it urges that a claim of the impossibility of obtaining an impartial trial is necessarily foreclosed when the defendant, freely and with the assistance of counsel, decides not to have one. Grassia responds that a defendant cannot be required to undergo a trial which the prosecution or the court has forced to occur at a place or a time that is inconsistent with the guarantees of the Sixth Amendment. His point is that the Amendment guarantees not only trial by an impartial jury but a "speedy" trial in the district where "the crime shall have been committed." He says that when this has been made impossible by the Government, as distinguished from third parties, the conventional remedies of extended continuance or change of venue are inappropriate since these involve a sacrifice of Sixth Amendment rights, and the only suitable remedy is dismissal of the indictment, thus rendering in-

consequential any plea of *nolo contendere* and waiver of trial.

We do not find it necessary to consider whether a case might conceivably arise where the Government's conduct in generating publicity had been so egregious and the prejudice engendered by it so pervasive, cf. *Irvin* v. *Dowd,* 366 U. S. 717 (1961), that the drastic sanction of dismissal of the indictment would be demanded, in the interest of the particular defendant or for general therapeutic purposes, or for both. It suffices for decision here that the hurdle confronting any such claim must be exceedingly high and that Grassia does not come close to meeting it. Although we disapprove of what seems to have been needless intensification by the Government of the news of the arrests and, still more, of the unnecessary statements by the Chief Assistant United States Attorney on the two following days, see *United States* v. *Costello, supra,* —— F. 2d at ——, slip opinion, 3326, it proved possible to obtain impartial juries even at Bridgeport where the publicity was at its peak, see *United States* v. *Piccioli, supra,* —— F. 2d at ——, slip opinion, 3336-37; *United States* v. *Markis, supra,* —— F. 2d at ——, slip opinion, 3344. Criminal defendants are understandably prone to exaggerate the interest their fellow citizens take in matters of such acute concern to them. The transfer of Grassia's trial to Hartford, also within the "district," on December 4 on his request, although doubtless prudent, thus did not result from any demonstrated impossibility of obtaining a speedy trial by an impartial jury in Bridgeport.[2] And although the fact that defendants arrested in the October raid were still awaiting trial rendered Chief Judge Timbers' statement of February 8, 1965, even

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2 As indicated in *United States* v. *Costello, supra,* —— F. 2d at ——, slip opinion, 3327, jury panels at the terms held in Bridgeport are not limited to residents of that city.

more ill-advised than we indicated in *United States* v. *Piccioli, supra,* —— F. 2d at ——, slip opinion, 3342, we are wholly unconvinced that this pronouncement, combined with the preceding publicity generated by the prosecutor and the judge, made it so plainly impossible to obtain an impartial jury in Hartford as to relieve Grassia of any need to develop the facts by adhering to his plea of not guilty and examining the venire at Hartford on a voir dire.

Affirmed.

Statutes, Constitutional Provisions, and Regulations Involved

68A Stat. 525 (1954), 26 U. S. C. §4401 (1958): *Imposition of tax*

(a) Wagers—There shall be imposed on wagers, as defined in section 4421, an excise tax equal to 10 percent of the amount thereof.

(b) Amount of wager—In determining the amount of any wager for the purposes of this subchapter, all charges incident to the placing of such wager shall be included; except that if the taxpayer establishes, in accordance with regulations prescribed by the Secretary or his delegate, that an amount equal to the tax imposed by this subchapter has been collected as a separate charge from the person placing such wager, the amount so collected shall be excluded.

(c) Persons liable for tax—Each person who is engaged in the business of accepting wagers shall be liable for and shall pay the tax under this subchapter on all wagers placed with him. Each person who conducts any wagering pool or lottery shall be liable for and shall pay the tax under this subchapter on all wagers placed in such pool or lottery. Any person required to register under section 4412 who receives wagers for or on behalf of another person without having registered under section 4412 the name and place of residence of such other person shall be liable for and shall pay the tax under this subchapter on all such wagers received by him.

68A Stat. 527 (1954), 26 U. S. C. §4411 (1958): *Imposition of tax*

There shall be imposed a special tax of $50 per year to be paid by each person who is liable for tax under section 4401 or who is engaged in receiving wagers for or on behalf of any person so liable.

68A Stat. 527 (1954), 26 U. S. C. §4412 (1958): *Registration*

(a) Requirement—Each person required to pay a special tax under this subchapter shall register with the official in charge of the internal revenue district—

(1) his name and place of residence;

(2) if he is liable for tax under subchapter A, each place of business where the activity which makes him so liable is carried on, and the name and place of residence of each person who is engaged in receiving wagers for him or on his behalf; and

(3) if he is engaged in receiving wagers for or on behalf of any person liable for tax under subchapter A, the name and place of residence of each such person.

(b) Firm or company—Where subsection (a) requires the name and place of residence of a firm or company to be registered, the names and places of residence of the several persons constituting the firm or company shall be registered.

(c) Supplemental information—In accordance with regulations prescribed by the Secretary, he or his delegate may require from time to time such supplemental

information from any person required to register under this section as may be needful to the enforcement of this chapter.

68A Stat. 851 (1954), 26 U. S. C. §7203 (1958): *Willful failure to file return, supply information or pay tax*

Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015 or section 6016), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution.

68A Stat. 732 (1954), 26 U. S. C. §6011 (1958): *General requirement of return, statement, or list*

(a) General rule.—When required by regulations prescribed by the Secretary or his delegate any person made liable for any tax imposed by this title, or for the collection thereof, shall make a return or statement according to the forms and regulations prescribed by the Secretary or his delegate. Every person required to make a return or statement shall include therein the information required by such forms or regulations.

Amend. V, U. S. Const.: *Capital Crimes; Double Jeopardy; Self-incrimination; Due Process; Just Compensation for Property.*

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amend. VI, U. S. Const.: *Jury Trial for Crimes, and Procedural Rights.*

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.

Amend. X, U. S. Const.: *Reserved Powers to States.*

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

26 C. F. R. §44.4412-1 (B)(2): *Registration.*

"(2) Each person engaged in the business of accepting wagers on his own account shall report on Form

11-C the name and address of each place where such business will be conducted and the name, address, and number appearing on the special (occupational) stamp of each agent or employee who may receive wagers on his behalf. Thereafter, a return shall be filed on Form 11-C, marked "Supplemental," each time an additional employee or agent is engaged to receive wagers. Such supplemental return shall be filed not later than 10 days after the date such additional employee or agent is engaged to receive wagers and shall show the name, address, and number appearing on the special (occupational) stamp of each such agent or employee. As to a change of address, see §44.4905-2.

Excerpt From Proceedings of November 17, 1965

[The following portion of the transcript was not printed in petitioners' appendix in the Court of Appeals, but is contained in the record on appeal filed in the Court of Appeals pursuant to Criminal Rule 39(b)(1), Civil Rule 75(o) and Second Circuit Rule 11(a) and certified to this Court by the Clerk of the court below. The discussion relates to motions in *United States* v. *Garamella,* which was dismissed on motion of the Government, and *United States* v. *Grassia, supra* (Jt. App. 24a). Both cases stem from the same raid by the Internal Revenue Service referred to in the instant cases. Petitioners reprint portions of the transcript here for the convenience of the Court, so that comments of trial counsel for petitioners regarding "motions that were made in previous cases of similar nature" (207a) may be more meaningful. The references set off by dashes are to the numbered pages of the original papers constituting the record on appeal in the court below.]

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Transcript of Proceedings Held on November 17, 1964, in Connection With Motions in the Above-Entitled Cases and in Related Cases (Other Occupational Tax Stamp Cases)

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

Bridgeport

Criminal No. 11,267

UNITED STATES,

—vs.—

FRANK COSTELLO *et al.*

Criminal No. 11,269

UNITED STATES,

—vs.—

FRANK COSTELLO.

Criminal No. 11,278

UNITED STATES,

—vs.—

ARTHUR GJANCI.

Criminal No. 11,270

UNITED STATES,

—vs.—

JAMES "TOTTO" MARCHETTI.

Before:

HON. WILLIAM H. TIMBERS,

Chief Judge.

I hereby certify that the attached transcript is a true and correct transcript of notes taken by me on November 17, 1964.

AUSTIN M. PHELPS
Official Court Reporter

March 7, 1965

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Tuesday, November 17, 1964, 10 A.M.

* * * * *

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Mr. Zeldes: Could I inquire about the status of the calendar?

The Court: Yes.

Mr. Zeldes: I have numerous people here under subpoena with regard to the defendant Grassia's motion to dismiss the indictment.

I wonder if I could excuse them until 2 o'clock, or what the Court's—

The Court: This is on the motion to dismiss in Grassia

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and Garamella?

Mr. Zeldes: Yes, your Honor. There are several others. There are some motions to suppress. I believe they are ahead of us. And a motion to dismiss on Christiano.

Mr. Owens: The only matter that is left, other than the resolving of the bill of particulars, is the United States vs. Christiano on the motion to suppress, your Honor, and the motion to dismiss would follow after that.

The Court: To answer Mr. Zeldes' question, any witnesses under subpoena, in any of these cases may be excused until 2 o'clock.

Mr. Zeldes: Thank you very much.

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MOTIONS TO DISMISS AND FOR CONTINUANCE

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Tuesday, November 17, 1964, 2 P.M.,
Afternoon Session

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Mr. Zeldes: Before we proceed, your Honor, I notice, for the record, Mr. Newman has handed up some affidavits in briefs.

I just want to indicate I am not waiving any rights nor in any way conceding the right of the Government to proceed by affidavits at this time.

May I proceed, your Honor?

The Court: Yes.

Mr. Zeldes: At the outset I would point out to the Court that in both of these cases, under date of November 13, I filed a notice to produce to the Government. And I understand from the Government that it will produce the press releases, two of the items I have requested.

And at this time I would request that the press release prepared by the representative of the United States prior to the raids of October 8 be marked as the first exhibit.

The Court: Well, I am going to defer, at least for the time being, any determination, any decision, as to whether evidence will be received at this hearing, either oral or documentary.

What you referred to so far is a document which I assume

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can be attached to an affidavit submitted in the usual form.

Mr. Zeldes: Not unless the Government does, your Honor. I didn't prepare the press release. If the Government will concede that the document they referred to in

their brief is the press release—of course I have no way of establishing it short of calling on the United States Attorneys. I am trying to avoid that, in the course that I have proceeded under so far.

The Court: I would assume that any document submitted by the Government in response to a motion to produce could be deemed by the Court to be an accurate copy of whatever it purports to be.

What I am getting at is, I am not prepared—I am not ruling one way or the other as to whether this is to be an evidentiary hearing. I want to hear arguments of counsel on the points of law involved.

Now if you want me to look at a press release, I understand the Government has produced it and said it is accurate, if there is any question about it. I assume it can be

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used for all purposes by the Court, under those circumstances.

Mr. Newman: So the record may be clear, your Honor, the so-called press release that was requested by counsel was furnished to counsel I believe on November 12. A copy of it is attached to my memorandum for the Court's benefit so that it is before us, certainly, for purposes of argument on these motions.

As far as defendant's notice to produce, I am aware of its existence. I confess I am not aware of its legal significance but we perhaps can deal with that subsequently during this proceeding. But the item that has been discussed so far, has already been handed to defense counsel and handed forward to the Court.

Mr. Zeldes: Should it be marked, your Honor, so that it is part of the record rather than part of a brief, which is technically not part of the record?

The Court: For the time being, I decline to have any evidence marked. I do think it is sufficiently before the Court to enable the Court to rule on this motion. It is at-

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tached to a brief of counsel, and that would apply to a brief on either side.

Mr. Zeldes: May I just say this, if your Honor please? When the motions were filed there was a notification to counsel for the Government that evidence would be offered and that subpoenas would issue. As a result, I have under subpoena here today four or five people who have spent most of the day sitting in court. They are important people in the community. There was no objection raised by the Government, when the motion was filed, to the taking of any evidence. The Government filed a brief this morning which is in essence a factual brief, reciting certain stated facts.

And now I am in the position that it is 3:30. I have people here who are very busy people. I would like to proceed.

There has been no objection to any evidence coming.

The Court: The Court makes the determination, though, Mr. Zeldes. Regardless of agreement of counsel, as to whether evidence is necessary on a motion, whether it is to be oral testimony, depositions, or it may very well be

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that the facts are stipulated so that it may eventuate with an agreement on the facts that makes taking of oral testimony unnecessary.

Mr. Zeldes: The only thing I can say in that regard, if your Honor please, is it takes me sort of short. The essence of the argument, as your Honor is aware if you have had a chance to read the brief, is a factual argument. Under the

decisions in United States against Hoffa, the Court held the hearings on this subject.

It seems difficult for the Court to weigh the publicity if it doesn't have the publicity. That is my job today, to try to give you the publicity.

I might say this, that I have an alternative motion which may perhaps cut through the point your Honor has perhaps rightly raised, and I didn't think of it. And that is the motion for continuance. Then I think there would be no question whatsoever that the Court would want to hear the publicity and the extent of the publicity.

I would like to file this at this time, your Honor. I notice in the Government's brief they suggest a motion for con-

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tinuance should have been made instead of what I labeled it. So, if your Honor please, I filed these two documents so that perhaps we can proceed with the factual basis.

The Court: If you can, I would suggest you go ahead with your argument. As you say, the hour *is* getting late.

And I have not ruled—I want to make it perfectly clear—one way or the other on your application to take oral testimony. All I am saying is that I want to find out what the motion is all about and see whether there are issues which require the taking of evidence.

Mr. Zeldes: Your Honor, in respect to the motion for continuance, we say that there has been excessive publicity, some of which, just for the immediate attention of the Court, we have put in the form of our brief. I am not sure if your Honor has been able to examine it. But perhaps I will have to argue factually on matters that are not in the record. I know no way of substantiating my factual argument without the evidence. In other words, we have made an allegation that there was publicity generated by the co-

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operation and collaboration of the United States in this case.

We first filed a motion to commit the indictment predicated on that ground. We now make a motion for continuance of this action, predicated on that ground.

The Court: What I am trying to find out is, What are you after? Are you after a dismissal of the indictment? Do you seek protective relief so far as the trial is concerned?

Mr. Zeldes: We seek (1) a dismissal of the indictment; and (2) we seek that, in the event the Court does not see fit to grant that on the basis of the evidence that we are about to present, we ask in the second motion without any waiving any rights under the pending motion, to dismiss the indictment. The defendants move that these actions be continued for one year because of the widespread publicity that has been generated.

Now it seems to me the essential thing to do is to find out what that publicity was.

The Court: In the first place, so far as your motion to dismiss the indictment is concerned, are you willing to con-

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cede that the indictment was returned by a Grand Jury before there was any publicity such as you claim?

Mr. Zeldes: Well, I believe the Grand Jury returned the indictment on October 6. And the publicity that I complain of commenced to be generated on October 8.

The Court: Subsequent to the time. Isn't that relevant to your motion to dismiss the indictment?

Mr. Zeldes: Not the sole basis, your Honor.

The Court: That is not what I asked. Isn't that a relevant fact?

Mr. Zeldes: Yes.

The Court: And you do concede it?

Mr. Zeldes: Let me say this. It is relevant if we were moving to dismiss because of a prejudicial Grand Jury, but we are not moving that. We are asking this Court to invoke its supervisory powers over a Federal official. I don't like to just make statements because I want to present them in an accurate context. If the Court desires—

The Court: I think you ought to go ahead, as I have said

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several times. Make your argument, although you may have to assume facts; because I do strongly insist that I want to see where we are going, what the issues are, before I permit the process of this Court, on a short calendar or motion calendar, to be invoked.

I recognize the power of the Court to do so. And as I said before, I not only will grant you leave to do so but I would take the initiative in insisting that evidence be taken provided I am convinced that the issues raised require it.

Now I think you should go forward, therefore, and state what further grounds, if any you have, for alleging that the indictment should be dismissed, and what further grounds, if any you have, that the defendants whom you represent cannot have a fair trial. I assume that is what you are getting at.

Mr. Zeldes: That is one of the bases of it, your Honor, but that is not the sole basis. It is bottomed partly on this Court's supervisory powers over Federal officials in the conscious generation of publicity. I think perhaps the most effective way to begin would be to read the press release

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that the United States issued to members of the press concerning this action.

The Court: That is the release attached to the Government's memorandum?

Mr. Zeldes: Yes. I assume it is the same copy which the Government informally gave me. There is no copy attached to it.

The Court: I think it will save a little time in the record if I read it, since I have not had an opportunity to, myself.

(The Court examined paper.)

The Court: Very well. The record will note that the Court has read the document attached to the Government's memorandum in opposition to the defendant's motion to dismiss the indictment, the document being headed, quote, "For Immediate Release", etc.

Mr. Zeldes: I don't know if this is the way to proceed, your Honor. I think it should be noted that this was a document prepared by the United States prior to the institution of the raids of October 8—for release to the press. Here again, I find myself in the position of making statements.

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And if your Honor wants at any time to challenge the statements, I will have no alternative but to proceed—

The Court: No. I suggest you go right ahead the way you are. I recognize the caveat you have thrown out. I will hear Government counsel in opposition. Maybe some of this can be conceded. And if there are critical issues that have to be resolved, there are ways of doing that.

Mr. Zeldes: I hope your Honor will bear with me if my procedure is somewhat stumbling, because I did not anticipate this particular approach.

The Court: You are too good a lawyer, Mr. Zeldes, to be thrown off by an unorthodox Judge.

(Laughter.)

Mr. Zeldes: I think perhaps one place would be to start with the events of October 8, if your Honor please. It is the position of the defendants in this case: The United States has cooperated and consciously generated publicity to the detriment of the defendants, and that this—based on the Court's supervisory powers, based on the due process clause, and based on the fact that the gambling laws are

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reserved to the States to enforce—together, is justification to dismiss this indictment.

Let us look at the facts for just a moment. Your Honor has seen the release referred to, by the Government. Just let me emphasize the first paragraph:

"In a spectacular thrust at the extensive gambling activities in this area"—

The Court: Mr. Zeldes, I don't want to interfere any more than I already have. But I have read this memorandum, this press release. And I do think I can read. And I don't think it is necessary to further load the record with it. You directed my attention to the first paragraph of it and I observe it.

Mr. Zeldes: Then I think perhaps we should go to the events of October 8 and see how the publicity, that was created, *was* created.

The Court: October 8 was the day of the raids?

Mr. Zeldes: Yes, your Honor. Before this raid commenced, newsmen—I don't know exactly how many—I do seem to have information to indicate several—were called together by a representative of the United States to meet

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in a private law office in the City of Bridgeport.

My best information indicates that at least some of them were in that private law office awaiting word of big news at about 1 o'clock on October 8.

And I caution again that I am stating evidence in the record at your Honor's request.

At approximately 1 o'clock.

The raids apparently commenced about 1:15 or 1:20.

That same afternoon at 3 o'clock this newspaper rolled. It's a banner headline in 84 point type: "Forty business places are raided in gambling crackdown here".

Two-line banner head, 84 point type.

For significance of news evaluation I show you the one-line 84 point type on Johnson's election as the President of the United States. (Laughter.)

How does it happen that a newspaper that goes to press at three o'clock can arrange to have this banner headline?

We know, your Honor, that the reporter for this paper

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was in the office, a private law office in Bridgeport, waiting word for this, between 1 and 1:30. That we know. Others were there, too.

And then newsmen were summoned to Middle Street. And photographers were there. The people started coming in to be booked, your Honor, and there is a photographer waiting. Here is a picture of one client. Here is a picture of other people. They are all there waiting as they come in, coincidentally.

These are papers I would like to present in evidence, if your Honor please, because the photostats didn't pick them up.

Mr. Newman: I object to that being offered at this time, your Honor. I assume it is being offered.

The Court: I have already ruled I am not receiving any evidence. I am just going to have to ask counsel to follow the ground rules I have laid down. The Court *can* take judicial notice of certain things. I have looked at what you have.

But what I am really getting at, Mr. Zeldes, and I don't want to appear to be acting as a tyrant here. But I want to know what your ultimate relief is sought, what you are

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getting at.

I understand all this. I wasn't born yesterday and I do read the newspapers.

But after all, we have a court to administer. We have got cases to try. And I have got to decide on the basis of what has been presented here—will be presented—among other things, how the administration of criminal justice should be conducted in this court. It really isn't very helpful to me to be looking at photographs taken at the time of the arrests.

I have to weigh, among other things, if you make a sufficient showing, whether there ought to be a change of venue, whether there ought to be a continuance, whether this can be handled by cautionary instruction to the jury.

I think if you can get to the guts of the thing without these courtroom flourishes, that may be intended for others than the Judge—I am just a little apprehensive that maybe you are not addressing yourself to the Court but to others who may be in the room.

Mr. Zeldes: I am not, your Honor. I hope you don't get

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that opinion. I am directing it to you and I think these facts—

The Court: I am sure I know you well enough to know that you would be reluctant to do that wittingly. But I do want to find out what you are getting at. What do you want me to do?

Mr. Zeldes: Here is what I want you to do, your Honor. I want you (1) to dismiss the indictment on the basis of the

factual I am about to present. (2) If you feel that that is not in order—and I am not the first counsel to ask for alternative relief—I request that, because of the conscious generation of publicity in this matter, this case be continued for one year. I urge the Court to realize that this is not the situation, not the situation where you have the free play of a free press inquiry for news, weighed against the rights of a fair trial. This is the situation where the United States has actively participated in the creation—just the headline, your Honor—"Gambling raiders seize 45 here. Syndicate broken, United States Official says".

It seems to me, your Honor, that we have a situation—

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and I am going into one other factual thing—that involves the sanctity of the Grand Jury order sealing the indictments. And it seems to me that that is something the Court should inquire in. And I think perhaps I should mention it and back track to October 6; because on October 6, if your Honor please, you sealed the indictments till further order of the Court. I can only assume that you were acting at the Government's request pursuant to Rule 6 which authorizes the sealing of an indictment for purposes of apprehension of the defendants.

Your Honor I have evidence, and I have requested other evidence, to indicate that some of the defendants were not arrested till 3:30 or quarter to four. Yet, for some strange reason, at the request of the Government, at 2:36 on October 8 the indictments were made public—2:36—just twenty-four minutes prior to the deadline that had to be met on this paper.

And this paper, if your Honor please, which went to press at 3 o'clock on October 8, had the names of two defendants that were not arrested till 3:30 or quarter to four. One was

identified as a kingpin or a key official. I forget the termi-

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nology used. Another was not identified in any noteworthy fashion.

So what do we have here? I say again we have conscious generation of publicity by the United States. And basically, I think the decision is this. Are we going to have the Department of Public Relations or the Department of Justice?

We are dealing here, if your Honor please, with a misdemeanor. Our clients were arrested, indicted by the Grand Jury for a misdemeanor, for failure to pay a $50 tax. It so says in the bill of particulars. And this is the headline.

Your Honor, these men, most of the defendants, mine included, own property. There is a procedure to commence a prosecution by a summons where you send out a letter and come in.

But if in the orderly course of the day the United States would have sent out summonses at the rate of ten a day and they would have come in staggered, what would have happened? On page 87 you would find that somebody was arrested for a Federal misdemeanor.

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In none of those papers, if your Honor please—in none of those papers is it even identified that we are dealing with a misdemeanor. The predominance is on gambling.

I think perhaps the best way to illustrate this is to go through and read the quotes that are set forth in our motion. I thought perhaps I detected an indication a moment ago that you didn't desire me to do that. I will—

The Court: I think you can assume I have or will read what you have got in your written documents.

Mr. Zeldes: But they are not there, if your Honor please. I mean all of the material isn't there. We have the reporters under subpoena. They are here.

Assuming, arguendo, that the motion for full dismissal isn't granted by your Honor, there is no question that this is relevant to a continuance. And until you know the breadth of the publicity, how can there be any determination of whether you should give a continuance?

There is no real Federal policy that justifies the sealing and unsealing of an indictment, which is really geared for

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publicity purposes rather than for apprehension of defendants.

And why was this released at 2:36 when the defendants were not apprehended for another hour? Was it because at about 2:25 there was wet in type a statement about Mr. Costello, that would soon be on the streets? Does the Government deny that Mr. Costello heard his arrest on the radio before he was arrested?

I should perhaps say a word about the release itself, and particularly in view of the Government's brief; because there is a clause in the Government's brief that is very telling, your Honor. They say, "These representatives of the press were given no information until all arrests had been made or attempted to be made."

Now who would have suffered if those indictments were kept sealed until the next day, till Costello and Verrilli were arrested? Who would have suffered?

Somebody's face would have been red while this was on the streets at 3 o'clock.

Rule 6 says that an indictment can be sealed for apprehension of the defendant. There is nothing to even suggest

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that indictments can be sealed and unsealed to meet deadlines of metropolitan daily newspapers, pressing deadlines.

And I think that the telling mark is in their brief. It says, "These representatives of the press were given no information until all arrests had been made or attempted to be made".

What is the significance of "attempted to be made"?

Is the Government saying, "Well, we tried to get them at 2 o'clock with the others but for some reason we missed them. But it was more important to open up these indictments for the press deadlines than it was to apprehend the defendants."

The words are there, themselves. The Government writes, "or attempted to be made".

And then the Government says in their brief or in the affidavit—I don't know which—"There was no discussion of any evidence"—no discussion of any evidence.

But in the release, page 2, if your Honor please, it points out that the United States Attorney noted that not one individual in the Bridgeport area currently holds an occupa-

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tional tax stamp. Isn't it an element of this crime that that is something the Government must prove in this courtroom? Don't we have a right to cross examine anyone who makes such a statement?

A representative of the United States announced to the press not one individual in the Bridgeport area currently holds an occupational tax stamp.

Would it be so terrible if the gentlemen of the fourth estate had to look up their own records?

And later on, if your Honor please, the criminal records of two defendants were issued to the press, according to the press.

I am not concerned whether they could have been dug

out of Mr. Earl's records for ten years ago or fifteen years ago when Adrian Maher was the U. S. Attorney.

I am concerned how it made this headline, how we got a headline with 84 point type, two lines, on a misdemeanor.

And let me say one other thing, your Honor, in connection with the whole planning of the raid, because I think it is significant: I don't have all the dates in front of me.

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But our clients, some of them, I believe, were arrested in, let's say, July 16 and September 2. Mr. Garamella was charged with having taken bets on those days. The latest one was September 2, your Honor.

The bill of particulars conclusively proves that the Government's case is predicated on undercover agents making bets. That is their claim. There is no question. They named the agent. They identified him in the bill of particulars.

The last bet was placed September 2 with Mr. Garamella, according to the indictment.

On October 8, swooping in—swooping in, to use the words of the United States, they ripped out telephones, they took money out of the defendants' pockets.

It is going to be very significant, if your Honor please, that a man on October 8 had $280 in his pocket. And they are going to try to tie that in with a bet on September 2.

Your Honor, this whole program was conceived to generate massive publicity. And it is an infringement of the 10th Amendment for this reason: The United States, per-

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haps, does not have faith in the local law enforcement agencies. But that does not give to the Attorney General of the United States or the United States Attorney in this

District the power to enforce the gambling laws. And this is a thinly veiled guise to do just that. It is significant. One of the newspapers said this, if your Honor please, which I think is very important:

"A Treasury spokesman said that it is not the policy to notify local police in advance of the raid."

That's a quote almost verbatim, I believe, from one of the papers.

But here we have a policy of the United States of America to summons reporters and hand out this with swooping and spectacular thrusts in advance of a raid, whereas they will not tell the local officials, according to the newspapers.

I ask simply this, your Honor. If they wanted to charge my clients with a crime, let them charge us with a crime. Let us try it in this courtroom or some other properly designated courtroom.

But is it necessary to have this material in the newspaper? Is it necessary to have a United States Attorney,

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being interviewed on the paper the next day, talking about the crying mothers who phoned up and said, "Oh, at last my husband won't gamble"?

Is that a relevant statement to the enforcement of the revenue laws, your Honor?

I say this, your Honor. There is some indication that the relief I seek in the original motion of full dismissal is novel. There is no authority contra to that request when it is tied in with both the 10th Amendment as we have done here and the fair trial and the supervisory powers.

But setting that aside for one minute, the record that I can present to you today, is the record I would like to

present to you today, because all of these people are here under subpoena and are all hot under the collar. Some of them had been advised not to talk to me outside of the courtroom, your Honor.

I would like to know who advised them to that effect.

It seems to me that this record, if I am wrong on the first point—and the record is identical—at least justifies a good healthy continuance. And that is why I have asked

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that this matter be continued for one year.

Are we in some kind of assembly line justice, if your Honor please? When I came before your Honor for a plea I asked for thirty days.

"No", said the United States. "We can't wait thirty days. We have to get this moving."

The United States was ordered by you, if your Honor please, to file its reply brief with me and with the Court on Friday.

I got it this morning at 10 o'clock when this matter came up.

I am not complaining. They were busy and there was a holiday.

But the time schedule just doesn't make sense.

This is a misdemeanor. This is not an assembly line to reel through conviction.

So it takes six more months. The commonweal won't come to an end. We are dealing with $50 of the Treasury.

In some of these stories certain people were identified as key figures.

Certain statements were made by Government officials:

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"Gambling is wide open."

"Authorities said Bridgeport was selected as the target for the crackdown because of extensive gambling in the city".

The Court: I have read your motion paper. I assume these are quotes from your motion paper?

Mr. Zeldes: No. Those are ones from the newspaper that I just read.

Here is one other that is not in my motion paper, that I think is significant, your Honor, just to show you the type of publicity.

And it related only to prejudice—stuff that could never come in in a trial.

"Authorities said that based on the $27,000 seized in the raids yesterday, the Bridgeport gambling operation involved gross receipts of more than one million dollars a year."

Your Honor, one of my clients was arrested with $285 in his pocket on October 8 that somehow the Government claims related to a bet he might have taken on September 2. On the basis of that type of information they have implanted in the community, the entire state of Connecticut, that there is a million dollar gambling ring going on down

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here.

I really don't know what else to say without going forward with the evidence. But I should think this, your Honor, that, regardless of this Court's view on it—and I think that I have made a compelling reason to justify at the minimum a continuance we request—certainly we cannot tolerate this assembly line justice where liberty is at stake. I think that we have an absolute right to place this material in the record.

And the way it now stands it is a little bit not clear. Your Honor may have read the papers at your home in Darien.

But when another Court reviews this, and when another Court, unfamiliar with Connecticut, views this in terms of the 10th Amendment, what will our approach be if they don't have the newspapers in front of them, if they don't have the papers to compare Mr. Johnson's victory over Mr. Goldwater—compare it to the apprehension of the gamblers?

And let me just point out one other, your Honor: "City gambling machine smashed."

We are not dealing with the gambling laws. We are

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dealing with the revenue laws. This is a misdemeanor, your Honor.

Can we get a trial?

I come back to the point that I made before, your Honor, and it is simply this. I am well steeped in the tradition of the First Amendment. I know the rights of a free press. I know the dilemma that is posed for the press in the coverage of trials.

That is not what is at stake here. We are not dealing with the fair trial vs. the First Amendment. We are dealing with one thing—the Department of Justice versus the Department of Public Relations. I think the Government has elected, if your Honor please, to pursue the former course, and forfeited their right to use this courtroom after creating massive publicity that could have only been generated in the procedures that they followed in manipulating the unsealing of an indictment, in issuing the press release, in summonsing the press into a private office in

Bridgeport to await word for the raids to open; in having reporters in front of the Revenue Building with cameras so that after defendants come in they can have their pic-

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tures taken and put on page 1.

And I do make this claim, your Honor. I have a scientific expert to offer on the effect of this publicity. I think it will be significant as an aid to the Court. He is here. I wanted to put in the evidence first and then have his testimony.

It seems to me that I have made the prima facie showing and ought to be allowed to proceed.

The Court: Well, I am going to hear the Government in opposition.

Do I understand, Mr. Zeldes, your argument you have just made is in support of the defendant's motion to dismiss the indictment in both the Grassia and Garamella cases?

Mr. Zeldes: Yes, your Honor, and also in support of the motion for continuance.

The Court: In support of all motions that you filed in both of these cases?

Mr. Zeldes: Yes.

The Court: Other than the bill of particulars?

Mr. Zeldes: That is right. I might add that, under your Honor's instruction, I think the only motions I was ordered

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to have filed, on the day that I filed them—and I met that deadline, were motions directed to the indictment.

The Court: Well, I am not sure what you mean by that. I certainly intended, by that direction, and the direction in all cases, that all motions of whatever nature in these

cases should be filed within the limits indicated, so that I could have them before me and rule on them at one time and get on with the trial of the cases.

Obviously, there are other claims, such as jurisdictional claims, to be raised at any time. But I did not contemplate, and I do not now, any delayed sequence in filing of motions. And I might say that any motions that have been filed without permission, without prior leave having been obtained from the Court, will not be considered in these cases.

Mr. Zeldes: That would not include, would it, your Honor, Rule 16 and 17 motions? I assume that you didn't include those—discovery type motions?

The Court: I assume all motions were to be made—Rule 16 and 17.

Mr. Zeldes: Perhaps in this—

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The Court: Obviously, if these cases are set for trial in less than two weeks from now, it would seem to me to be elemental and proper administration of justice that all motions be filed when directed so that the Court could devote, as I have, a day to the hearing of the motions and whatever time is necessary to deciding them. I do not anticipate entertaining any further motions after this time.

Mr. Zeldes: Well, perhaps—I think when your Honor views the matters that we have presented you might feel somewhat differently, at least on the matter for continuance.

And then if I misinterpreted your prior order—I didn't think there was any reference to discovery motions. I thought it was motions directed to the indictment.

The Court: What is a bill of particulars motion?

Mr. Zeldes: It is directed to make the indictment more specific.

The Court: Well, so there will be no question about it, the order that the Court made at the time pleas were entered in these cases, that all motions should be filed on or before a specified day, accompanied by supporting briefs

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and affidavits, followed by the filing of opposing briefs and claiming the motions for argument on November 16, that are now before the Court on November 17, that order was intended to cover all motions, which is just what was stated. And I am going to adhere to that order rigidly, which is necessary in view of the number of cases involved, the number of defendants involved, the number of counsel involved.

I think it is only fair to all counsel to be treated uniformly. That is the way it will stand anyhow.

I will hear the Government in opposition to the defendants' motions in Garamella and Grassia.

Mr. Newman: If your Honor please, I am not overwhelmed by the ferocity of the argument that is being addressed to the Government's conduct in this case. Defendants have leveled a very serious charge at the Government and in particular the office of the United States Attorney. Their papers allege that there has been a concerted effort by the United States Attorney's office to conduct a trial by newspaper and for that reason they ask that the indictments be dismissed.

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As our opposing memorandum points out, there is no statement that I am aware of, alleged by these defendants, either in their written or oral presentations, that alleges that, as to the particular defendants here involved, any representative of the Government divulged any of the evi-

dence which the Government intends to produce against these defendants; that no statement was made as to the guilt of these defendants and that no statement was made as to any prior criminal record of these defendants.

Now as I read the papers and listen to Mr. Zeldes' argument, the nub of his complaint, and his very serious claim, of trial by publicity, boils down quite simply to the fact, undisputed by the Government, that representatives of the press were given advance notice of the fact that arrests were likely to be made in the City of Bridgeport on the date in question. And I am fully prepared to defend the Government's right to give that information to the press. I want to be very clear with the Court about it.

There was a plan to make a series of arrests on a single

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day. There is no question about that. The Government does not deny it. I don't know of any authority that says that a defendant has a right to be arrested on a day of his own choosing. If the Government wishes to arrest a group of people on the same day where similar conduct is involved, it seems to me that is the Government's absolute right. And experience has shown that the Government is quite wise in seeking to do that, wise in the sense of making their arrest effective, of preserving evidence, and generally enforcing the laws of the United States.

Now as to the specific issue of whether the press could be notified ahead of time, it seems to me that issue is quite clear also. In any large-scale operation of this sort there is always a likelihood that information will be prematurely released. The release of that information prematurely might well defeat the entire administration and enforcement of justice and the enforcement of these statutes. And

therefore in this case, as has been done in other jurisdictions, the press is notified ahead of time in confidence of the likelihood that a series of arrests will be made. They

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are not told who is going to be arrested. They are not told where the arrest will be made. But they are told that there is a strong likelihood that there will be legitimate news available to them at the appropriate time. That was done in this case.

Now while defendant's counsel makes a great deal of saying that the reporters and all were placed in one location, it seems to me that is the obvious way to do it. I don't think we should have them scattered all over town. It seems to me the most prudent possible way to handle it is to tell the reporters that there will be legitimate news, to suggest that they be at one place where they may find out about the news when it's appropriate that they know about it, and then, when it is appropriate, to tell them the fact of the arrest and the charge and the nature of the proceedings.

That is the essence of this claim, it seems to me, is that they *were* notified ahead of time. And I think the Government has an absolute right to do that. And I don't think that any evidentiary basis is needed to establish that they were notified ahead of time, because the Government is

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quite willing to concede, and the record may show, that they were notified ahead of time of the likelihood of an arrest.

The complaint that the defendants draw out of this conduct of the Government is that there were large headlines in the local press saying that a group of defendants were

arrested. And again we need no evidentiary hearing on that basis because the Government is perfectly willing to concede that the fact of the arrest was given extensive publicity, as well it might have been. A number of people were arrested. There is intrinsic news value in the fact of arresting this number of people. And while defense counsel may make light of the fact that the tax involved is only a $50 amount, surely that does not in any way go to the issue of the newsworthiness of the arrest. In any event, that would be a judgment for the press and not the Court.

But it seems to me the press is quite within its bounds in giving publicity to violations of wagering laws.

Now while defense counsel suggests, if not maintains,

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that we should close our eyes to the issue of wagering and look at this purely as a taxing matter, the fact is we are enforcing a wagering law tax. It is denominated as a wagering tax in the Internal Revenue Code; so there is no secret about that. And I don't think the fact that we talk about it as a wagering tax in any way impedes the Government's right to enforce the penalties for nonpayment of that tax, regardless of whether it is $50 or $5,000. It is a tax, due and owing, of people who choose to enter the business of wagering. And if they are arrested for not doing that, it is legitimate news for the local press that they *were* arrested for not paying a tax required of those who choose to be in the business of wagering. And that's the law. And the facts surrounding the arrests are not disputed by the Government.

So, we have the issue of the press being notified in advance. As to that, we say that we have every right to notify them, and that no prejudice of which these defendants may legitimately complain arose out of that.

There has been no discussion of evidence relating to these defendants, no statements of prosecutors or other Gov-

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ernment agents as to the guilt of these defendants.

The publicity attended the fact of the arrest. It was given extensive publicity. There is no question about that. But it seems to me that that is a right of the press to decide the inherent news value of a series of arrests of this size. And I don't see where the Government has any cause to be the least bit concerned about letting the press report legitimate news.

Now were there any allegations here that evidence as to the guilt of these particular defendants was discussed with the press, that would be an entirely different matter. But I have read the motion, and I don't see why we need any evidentiary showing beyond the motion because the motion itself asserts what the defendants would like to prove. And there is nothing in the motion that talks about evidence of the guilt of these defendants being discussed by the Government with the press.

Now finally, we come to the statements in the press release itself. At this point, as I want to be throughout this,

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I want to be entirely candid with the Court. As the Court may know, this press release was issued prior to the time that I was associated with the United States Attorney's office. In terms of the internal administration of the office of the United States Attorney I am not prepared to say whether every single statement in that press release ought to have been made. But I repeat, I say that I have some indecision in my own mind only in regard to the internal administration of the U. S. Attorney's office.

On the issue which concerns this Court and which is before this Court, namely whether anything in that document justifies the dismissal of this indictment, I have no hesitancy whatsoever to represent to this Court that nothing in that statement in law justifies the dismissal of this indictment. Nothing in that statement involves the discussion of evidence or the guilt of these defendants in the type of prejudicial way which could even come close to raising an issue as to dismissal.

Now I understand that counsel is now seeking, as an alternative remedy, to ask for a continuance. And on that

issue I would simply say that again the motion, taken as pleaded, raises no issue justifying a continuance. The publicity that counsel complains about is publicity of the fact of the arrest and not of evidence that might have come to the jury's attention prejudicing them or potential jurors in their ability to make a fair determination of the facts. Furthermore, if there were any doubt in the Court's mind, based on the matters pleaded, regardless of what might be proved, but based on the matters pleaded, it seems to me then the proper remedy for counsel to request would be to have this matter heard perhaps in Hartford. But as I understand it, at the time the defendants were put to plea in almost all cases—I believe in the instant case—the request was made to bring the cases here to Bridgeport.

Mr. Zeldes: Not true in this case, your Honor.

Mr. Newman: It is not true in this case?

Mr. Zeldes: No.

Mr. Newman: Well, I am sorry, then. I understand it was true in most of the cases that were made.

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The Court: My recollection is that of the forty-eight or forty-nine pleas of not guilty that were entered before me, requests were made by or on behalf of all counsel to have cases tried in Bridgeport except I know there were one or two either made no request or a request that they be tried in Hartford.

Now were you one of those?

Mr. Zeldes: Your Honor, you may recall I reserved the right to urge your Honor to place another place of trial, and also whether or not to be tried by Court or jury. That determination has not been made in this Court yet. I reserved the right at that time.

Mr. Newman: I would say, your Honor, I would have no objection whatsoever to this case, if counsel so chooses to move it, if the Court wishes to accede to it. I would interpose no objection to this case being tried at Hartford.

I don't suggest that there has been any showing of the type of prejudicial publicity which justifies any relief whatsoever. Nevertheless, I wouldn't object to a hearing

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in Hartford. But there clearly has not been the type of publicity, whether Government-generated or otherwise, that justifies dismissal or continuance. There has been no issue, no discussion of the type of evidence that will be presented against these defendants, of their guilt or of their past criminal record.

There was a statement made by counsel that someone discussed the past criminal record of some defendant. I didn't take him to say that that was done in his case. I am not aware of that being done. I am not aware of that being done by any representative of the United States

Government. But I don't think I can pursue it since I am not aware that defense counsel is pursuing it as to his defendants. But if there is such an allegation as to other cases, then of course I want to know about it and find out about it. But I can't say more about it because it isn't being raised in these cases.

Now counsel in his motion has raised issues going beyond the issue of publicity. He has raised 10th Amendment issues and he has raised self-incrimination issues. I don't know what your Honor's pleasure is, whether you

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want those pursued at this point or whether counsel wishes to pursue them or what, or should we stay with the publicity issue at this point?

The Court: I believe Mr. Zeldes at least made some reference to the 10th Amendment argument, I don't remember hearing anything orally stated at the time—

Mr. Newman: Well, I would be glad to take just a minute more to wrap up the entire thing, then. As I understand his 10th Amendment argument from his papers, it is that, while the statutes may be valid as a legitimate exercise of the taxing power, as the Supreme Court held in the Carver case, their enforcement in the circumstances of this case is barred by the 10th Amendment. Now it seems to me that the argument falls of its own weight; that you can't fairly say the Government has a right to assess a tax but does not have a right to prosecute for nonpayment of the tax. In this case the prosecution *is* for nonpayment of the tax and failure to file the registration statement incident to the obtaining of the gambling tax stamp.

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The fact that the tax is a condition precedent to entering into the business of gambling is a fact of life and part of the law of this land. And if these defendants are adversely affected by anyone reading about the fact that they were arrested for not paying a gambling tax, that's part of life, and I don't see where the Government or anyone else need be the least bit remorseful that there was publicity of the fact of an arrest for that particular violation, or indeed of the fact that forty-five people were arrested the same day for that same violation.

That happens to be the law they stand accused of violating. We are prepared to prove they did violate it. The fact that there was publicity in connection with the arrest, it seems to me, is nothing the Government need take umbrage at. We say there is no issue as to the publicity, that it is not the type of publicity, generated by the Government or in the community in general, which would prejudice these defendants in securing a fair trial.

And on the very serious charge that the Government's own conduct is so objectionable as to require dismissal or any other remedy—it seems to me there is a total failure

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to substantiate such a very serious charge. The nub of the allegation in regard to the Government's conduct is simply prior notification to the press of the likelihood of arrests.

I am personally prepared to defend the Government's right to do this. I see no justification for giving these defendants any relief because of the Government's conduct in letting the press know that there is going to be a legitimate news story which they may report in a full, accurate way—and not in a premature way, which often happens when the

press is not put on notice of the likelihood of this type of incident.

Mr. Zeldes: May it please the Court, I think there are several—both omissions and errors I would like to point out that I think are quite significant: First, as to the type of publicity concerning the evidence that will be adduced at the trial, by the very nature, your Honor, of things, we are concerned with not just the elements of the crime that they can establish in the courtroom but what they saturated in the press, your Honor, that they never would be allowed to use, on Friday, the day after the arrest—Saturday; I am

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sorry, your Honor.

"Housewives voice thanks for gambling crackdown. 'Thank God you finally broke it up. My husband's gambling has ruined our home!' Gratitude voiced.

"This remark was more than one of a dozen emotional expressions of gratitude voiced by housewives who contacted Howard T. Owens, Jr., Chief Assistant U. S. Attorney, in the wake of the gambling raids by Treasury agents and State Police on Thursday.

" 'Some of the women even cried as they told me how gambling by their husbands had caused them continuous hardship,' Mr. Owens said.

"Meanwhile, Treasury agents indicated the crackdown on gambling activities here and the arrest of 45 persons on charge of failing to purchase federal gambling"—

The Court: (Interrupting) Mr. Zeldes, I really think you are imposing on the Court. I don't like to say that you are, but I have been asking you for more than an hour now—if you are going to start reading the newspapers the Govern-

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ment is entitled to read in rebuttal. And I really don't think

it advances the matter one iota. I have got the issues clearly in mind and I don't think I need any more reading material to clarify it.

Mr. Zeldes: Can I ask question, if your Honor please, particularly in regard to the motion for continuance? And this goes to one of Mr. Newman's matters that he did not mention.

In their brief they say the appropriate remedy would be by motion for continuance.

Now we have made the motion for continuance. The evidence is here ready to go in the record.

How can the Court—and I of course ask this rhetorically because I have no power to compel an answer—how can the Court analyze the nature of publicity without having the publicity before the Court?

And one other thing I think is important that was not enlarged upon by the United States. I pointed out to your Honor that the unsealing order was filed at 2:36 P.M. I also pointed out to your Honor that the deadline in the Bridgeport Post is 3 o'clock for that afternoon edition.

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I have spoken with a reporter who has told me that he had everything necessary to write his story by about 2:10, twenty minutes before this was unsealed by your Honor's order. His story contained the names of people who were not even arrested when he wrote it.

And one other thing, your Honor. Mr. Owens says nothing about their being convicted.

If they mention convictions of co-defendants, that creates publicity as to all defendants in this dragnet, which was one of the points we mentioned.

Mr. Owens said Costello and Marchetti had previous convictions for income tax violations. That answers Mr. Newman's point on that, on the point that there was no discus-

sion. I point out the very press release—United States Attorney Eagan noted not one person in the Bridgeport area currently holds an occupational tax stamp.

I urge your Honor to analyze the lead in that release, the first paragraph of that release. The connotative words in there are something to behold.

I think, from your Honor's opinion in the Vermont case that you have—

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The Court: In which I was reversed.

Mr. Zeldes: But if you recall, in that reversal, if your Honor please, the Court of Appeals for this Circuit said, if we were dealing with a Federal criminal prosecution we would compel reversal.

And what I am asking for now is to make the record so we can have the evidence for a determination. It seems to me the Government has not in any way justified seeking your Honor's permission to open up that order at 2:36 P.M.

In so far as we are dealing with the 5th Amendment, if your Honor please, and the 10th Amendment too—I am not sure of the status. But your Honor had entered a specific order the Government's brief was to be filed on Friday. It was not filed on Friday. So I should think we would be allowed the four or five days to reply to it that we would have if they had filed on time.

Strict filing seems to be required of the defendant. It seems to me we shouldn't have a double standard apply to the United States.

The Court: I don't recall I provided for reply briefs at all.

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Mr. Zeldes: You did, your Honor. You said mine to be filed on the 10th, the Government's reply on the 13th.

Mr. Newman: And that is all.

Mr. Zeldes: No. But I would have had a chance to look it over. I just got it this morning. And to cite your Honor authority, I would have obviously had an opportunity to file a reply brief this morning.

The Court: Under the circumstances, I will give you twenty-four hours in which to file a reply. If you will have it in by four o'clock tomorrow afternoon I will take it into account.

The Court will reserve decision upon the pending motions on which I have not ruled in the last three cases on today's motion calendar—in the Christiano, Grassia and Garamella cases—including the applications of counsel in each of these cases to take oral evidence or to present evidence, oral and documentary, in support of their respective motions. The Court will make a determination, of course, on that application before ruling on the merits. Depending upon how the Court rules on that application to take testimony, I may or

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may not be in a position to rule on the merits.

Mr. Zeldes: May I make one further inquiry?

The Court: Yes.

Mr. Zeldes: As I said before, I have a number of people under subpoena. These people will not voluntarily come to Court at my request, all of them.

The Court: Well, I don't really see that I have any power, and I do not believe I am justified on what I have heard so far, to order continuance of the subpoenas. It is counsel's responsibility, of course, in subpoenaing witnesses to be heard on a motion calendar.

That is entirely a matter within the Court's discretion. I did, this noon, order those witnesses who had been subpoenaed and who were in the courtroom to return this after-

noon, not knowing what was coming. But I will not order any further continuance of the subpoenas.

If it becomes necessary to take any evidence, it may be reopened, even, if you wish to bring in the evidence.

But the short of it is I am not continuing *this* hearing for

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the purpose of taking evidence, and I am not ordering the witnesses to remain, who have been subpoenaed today.

Mr. Zeldes: May I ask one other question along this line, if your Honor please? And that is in relation to the status of the record, as we did have the people here. Can I state for the record the nature of the evidence we intended to offer, particularly with relation to the motion for continuance, so that there is no misunderstanding on the Court's part or on the record's part of what we are offering?

The Court: No. I think that is unnecessary. In the first place, I haven't ruled on the application to take oral evidence. In the event the Court denies that application, counsel *are* granted leave, in one week after denial of such application, to file a written offer of proof to indicate what they would adduce or seek to adduce if leave to do so were granted. Obviously, counsel have in mind—and I am directing my remarks to experienced counsel who enjoy the highest respect and esteem of this Court—counsel obviously understand that it would be physically impossible to ad-

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minister this court if the privilege or leave to take oral evidence of the sort which you contemplate on these motions were to be granted as a matter of course. There simply is not the judicial manpower available in this District to handle such things.

Accordingly, the Court must, in the exercise of its discretion, treat such applications accordingly. And as I say

repeatedly, I will not hesitate to take evidence when I believe it is needed. If it is not needed it will be an unwarranted imposition upon all concerned, including the Judges, to convert every criminal prosecution to an attempt to investigate the Department of Justice and the United States Attorney's office.

That is not in any way to reflect any decision of the Court, that I have made up my mind so far as the issues are presented. But I make the observation in passing.

I assume experienced, able and astute counsel realize that it is impossible for this Court to carry on the business of the Court if every motion calendared in effect is going to be

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converted into a hearing on evidentiary matters. It was never the intention of the Judges, in setting up motion calendars, to do so, any more than Judges in the State Court permit the taking of evidence as a matter of course in short calendars. It is a privilege to be invoked in the truly extraordinary case. And I have got to be satisfied this is the extraordinary case where that privilege will be necessary in the administration of justice and will not be abused.

Mr. Zeldes: May I just add one more problem, inform the Court of one problem?

As I said, we have a half a dozen or so subpoenas out for people who do not like spending the day in court. Although they are pleasant with me, they are concerned about their news sources, quite properly, as news men.

Would it be an imposition on the Court to require a week's notice on subpoenas? All these subpoenas will have to be reissued at considerable expense, provided we are to have a hearing. I would request we have four or five days to get the subpoenas out again. And it will mean double

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the same expense we have.

The Court: Mr. Zeldes, I think you are about six jumps ahead of yourself. I have several things to decide. I am leaving it as it is. I will make no order with respect to any further evidentiary hearing of any of these motions.

I will state, simply because I don't think it is entirely beside the point, particularly since Mr. Zeldes has referred to it, has referred to a decision of mine in another jurisdiction in this Circuit, that while sitting in that jurisdiction, by the way, a practice was brought to my attention that I don't think is altogether irrelevant to some of the issues that are raised here today.

The situation was brought to my attention under these circumstances: In trying a criminal jury case I instructed the jury, as I customarily do in any case, particularly a jury case, to scrupulously refrain from reading the newspapers, not to pay any attention to anything about the case and if they see any headlines or any indication in the newspaper about the case on trial to refrain from reading it.

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And the jury was thereupon excused for the day, whereupon I was informed by the Court officials that that was a rather unusual instruction to give in that District and that the reporter for the three papers involved was, and had been for many years, the law clerk to the Federal Judge.

And I was surprised at first. But upon talking to Judge Gibson about it afterwards, I am satisfied that that was an example of rather shrewd Vermont common sense.

He decided that the way to get the news story accurately and completely purged of any prejudicial material, was to release it himself, which he has done. And I think Gibson is one of the best Federal Judges in the country.

So I don't think that the source of news from one of the branches of Government necessarily makes it prejudicial. On the contrary, it may well serve to protect the interests rather than to jeopardize the interests of parties to the case.

Mr. Zeldes: Just one other thing, your Honor, and then I will shut up. And I know you are anxious to have me do just that.

MOTION TO STRIKE

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I would move that the Government's affidavits of Mr. Eagan and Mr. Owens be stricken from the record. It seems wholly unfair for the United States to be able to present by evidence their position on this matter and we are not allowed to proceed. If Mr. Owens and Mr. Eagan want to testify, then there will be a time for that. Self-serving affidavits, I think, should be stricken at this time.

The Court: I will deny that motion. I have granted parties on both sides considerable liberality with respect to submitting papers. And it is not my practice to require—much less encourage—attorneys to take the witness stand. I have had some experience in that regard myself, and I take a dim view of Government counsel on the witness stand.

Mr. Newman: If the Court please, there seems to be one matter still pending. I am just not sure. Perhaps it has been disposed of, but I would like to be certain.

Mr. Zeldes filed a motion—requested from the Court and received a subpoena duces tecum of a Treasury agent.

Now I understand that he is now released of his obliga-

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tion to be available for testimony unless subsequently served. But I am not clear of the effect of the order that is

upon him to produce. There was an order to produce at this place at this time.

I have a motion to quash that but I am not sure that your Honor wants to hear that at this point. I just want to be sure we don't leave uncertain as to the effect of the order to produce, as well as the order to appear.

The Court: Well, so there will be no question about it, the Court will order, in view of the fact that this hearing has been terminated—I have heard exhaustively all I intend to hear at this time, subject to the rulings that I have indicated I will make. I therefore am going to order that all subpoenas, including any subpoenas duces tecum, which have been issued at the behest of either side, be terminated. There is no further obligation on the part of any witness to appear or to produce any records in connection with the hearings in these cases. And if it becomes necessary at a future time to hold hearings, necessary subpoenas can be issued or reissued. All outstanding subpoenas have been

fully satisfied and are therefore terminated as of this time.

Mr. Newman: Thank you.

(Hearing closed.)